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In The

Supreme Court of the United States

October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONERS' SUPPLEMENTAL BRIEF

This Supplemental Brief responds to the Solicitor General's Brief for the United States as Amicus Curiae.

STATEMENT

The Solicitor General misstates the issue before the Court. The questions here are whether the District Court and the Court of Appeals for the Tenth Circuit appropriately discounted petitioners' unrebutted voting analyses, based solely on the anecdotal testimony of one lay witness, and whether petitioners' unrebutted proof of

racially polarized voting together with continual Hispanic electoral defeat can result in holding that Hispanic preferred candidates were not defeated by Anglo bloc voting based solely on the election more than twenty years ago of unopposed Hispanic candidates and on the election of Anglo Democrats.[1] When the Solicitor General focuses on these particular questions, he agrees with petitioners that such reliance is improper.

First, as to political cohesiveness the Solicitor General agrees with petitioners: "In the presence of an unrebutted statistical showing that the minority community votes as a bloc, it is difficult to see how anecdotal testimony of the sort at issue here from a single lay witness could be sufficient to support a finding of lack of political cohesion." A.C. 10.

Second, as to the defeat of the Hispanic's preferred candidates by Anglo voters, the Solicitor General again agrees with petitioners: "the courts of appeal have generally recognized – and the United States has consistently argued – that evidence concerning elections in which no minority candidate ran is insufficient to rebut a clear pattern of lack of electoral success in elections in which a minority candidate was in the field." [citation omitted] A.C. 14.

Nevertheless, in order to justify his recommendation, the Solicitor General frames both issues around whether the lower courts' factual determinations were clearly erroneous. Even on this score, the Solicitor General cannot

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[1] The Solicitor General recognizes that these issues framed the basis of the rulings below. Brief of the Solicitor General for the United States as Amicus Curiae at p. 5, (hereinafter A.C. ___).

escape the reality that the District Court and Court of Appeals allowed evidence which this Court has identified as being of limited value to overcome entirely unrebutted facts which the Court has identified as determinative of vote dilution issues. *Thorburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed. 2d 25 (1986) (*Gingles*).

DISCUSSION

1. Cohesiveness

The Solicitor General concludes that the decision of the Court of Appeals for the Tenth Circuit in affirming the District Court's findings of lack of cohesion in the Hispanic community of Saguache County does not depart so clearly from the consensus of the courts of appeals on the correct legal standards that it creates a conflict among the circuits requiring resolution by this Court. A.C. 12.

The Solicitor General's conclusion is undermined by his own recognition under applicable legal principles that: 1) a determination of cohesiveness cannot be made apart from a study of the analysis of racial bloc voting, 2) lay witness testimony is insufficient to overcome unrebutted statistical evidence of cohesiveness, and 3) the exclusion of consideration of voting behavior analysis in exogenous elections is erroneous. A.C. 9-11.

In allowing that the Tenth Circuit's reliance on the testimony of a single lay witness to counter unrebutted statistical evidence of minority voter cohesiveness presented by petitioners "may have been appropriate," the Solicitor General presumes a weakness in petitioners'

statistical evidence. A.C. 10. That weakness he subsequently explains resulted when petitioners failed to include analysis of Anglo versus Anglo elections and included only the small sample of the three County Commission elections in which Mexican American candidates ran. A.C. 10-11. However, the Solicitor General also subsequently recognized that the omission of Anglo versus Anglo elections should not have been regarded as a determinative factor[2] and the seven exogenous county-wide election analyses presented as evidence by petitioners should have been included and not discounted in the analysis of political cohesiveness. A.C. 11. Despite these specific acknowledgements and without any authority, the Solicitor reached the conclusion that where statistical evidence is found to be "weak," testimony from a single lay witness could indeed be sufficient to support a finding of lack of political cohesiveness. A.C. 10. These conclusions of both courts below and the Solicitor General are contrary to the Supreme Court and other appellate court holdings.

Where statistical data is limited because the minority community has only recently and limitedly begun sponsoring candidates, the lack of numbers of elections available for analysis should not be used against the minority community. *Gingles*, 478 U.S. at 57, n. 25. Exogenous

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[2] See p. 6, *infra*. In fact, the Solicitor General pointed out that the findings of both courts below that the three successful Anglo Democratic commissioner candidates were the "candidates of choice" of the Hispanic community " . . . strongly suggests Hispanics do vote as a bloc . . . " directly contradicting the findings of those courts that Saguache County Hispanic voters are not politically cohesive. A.C. 10.

elections which can demonstrate the actual voting behavior in the jurisdiction should be considered and are probative in the determination of racially polarized voting, thus political cohesion. *Solomon v. Liberty County*, 865 F.2d 1566 (11th Cir. 1988) (*Solomon*); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989) (*Gretna*). Exclusion or disregard of such evidence is error. *Solomon*, 865 F.2d at 1578; *see also Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987); *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988), *aff'd*, 109 S.Ct. 548 (1988) (*Smith*). The Solicitor General's gratuitous comments that the weight to be given such evidence varies from case to case is an effort to detract from the clear error committed by the Tenth Circuit and District Court in their dismissal of such evidence, describing behavior of the identical universe of voters. Clearly in this case the facts compel the inclusion, not the exclusion of exogenous elections because of the limited number of direct elections available for analysis and the weight given the evidence should be probative, not limited. Any lesser consideration of evidence contravenes *Gingles*. Petitioners' evidence of racially polarized voting thus political cohesiveness, with the inclusion of the exogenous elections, is without question both strong and unrebutted.

Regarding the lower courts' reliance on the elevation of the anecdotal testimony of a single lay witness as more probative than statistical analysis of actual voter behavior in determining the existence of political cohesiveness of the Saguache minority community, the Solicitor General recognized that the finding is insufficiently supported. A.C. 10 (". . . the opinion of the court of appeals may well be mistaken.") Yet, without reference to authority, the Solicitor General attempts to create an exception to the

unequivocal rule in the Ninth and Fifth Circuits when he allows that where unrebutted statistical evidence is characterized as "weak" by the district court, then contradicting anecdotal evidence may be considered more probative.

Recently the Ninth Circuit determined that actual patterns of voting behavior established by statistical evidence cannot be contradicted by anecdotal evidence of differences in the minority community. *Gomez v. Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1534 (1989) (*Gomez*). Once racially polarized voting is established through statistical evidence, the requisite political cohesiveness of the minority group is conclusively established. *Gomez*, 863 F.2d at 1416; *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) (*Baytown*). In this case both courts below accepted the anecdotal evidence of a single lay witness as sufficient to overcome the unrebutted statistical evidence. That the statistical evidence was limited by the number of elections available for analysis does not detract from its superior probative value. *Solomon*, 865 F.2d at 1578. *Gretna*, 884 F.2d at 502. The "weaknesses" found in the petitioners' statistical data was directly attributable to erroneous exclusion of exogenous elections by the lower courts. Despite the reduction of petitioners' statistical data by the lower courts to only three elections, that data remains the unrebutted evidence of actual voting patterns and is unqualifiedly more reliable than, and of superior probative value, to anecdotal testimony of one lay witness in demonstrating existence of political cohesiveness. *Gomez*, 863 F.2d at 1416. The Solicitor General's reasoning that the Tenth Circuit may have appropriately accepted such evidence as conclusive is a sleight of hand

effort to mask the clearly erroneous application of law by the Tenth Circuit.

2. Ango Bloc Vote

The Solicitor General concludes on the question of whether the courts below erred with respect to the correct standard to be applied in determining whether a sufficiently large Anglo bloc vote that usually defeats Hispanic preferred candidates exists in Saguache County is uniquely tied to the facts of this case and therefore does not warrant review here. A.C. 16.

The Solicitor General's conclusion is completely at odds with his own analysis of the legal principles applied by the courts below on this issue. The Solicitor General recognizes that the Court of Appeal's holding that petitioners had not shown a pattern of racially polarized voting and Anglo bloc voting sufficiently large to defeat Hispanic preferred candidates had two primary bases: the election of unopposed Hispanics, and the election of three Anglos argued to be candidates of choice of the Hispanic community. A.C. 12.

a) Regarding the reliance of the Tenth Circuit on the fact that some unopposed Hispanics more than twenty years ago had secured election, the Solicitor General recognizes that this Court has warned against giving undue evidentiary weight to just such evidence. A.C. 12. Yet, without explanation and without authority the Solicitor General concludes that when considered together with active political party participation and near electoral success in two county-wide races, the election of unopposed Hispanic candidates may foreclose petitioners' claim. A.C. 13. Such a conclusion runs contrary to this Court's decision in *Gingles*, 478 U.S. at 51.

Gingles explicitly establishes that minority candidates running unopposed is a special circumstance that cannot undermine a showing of consistent electoral defeat of minority preferred candidates by an Anglo voting majority. *Id.* This Court did not qualify the special circumstance described above by stating that such unopposed election may have more weight if accompanied by continual electoral defeat of minority candidates that *almost* win. The Solicitor General's argument that the clear directive from this Court is lessened by the Hispanic community's active participation in the political process and by the relative close results of two elections defies explanation and certainly lacks authority.

b) Regarding the Tenth Circuit's reliance on the results of three Anglo-Anglo contests, the Solicitor General recognizes the issue of relevance of Anglo versus Anglo candidates arises when "the defendant has attempted to show that, although the minority community has not been able to elect minority candidates, it has achieved success because it has supported non-minority candidates who won in elections . . . against other non-minority candidates." A.C. 14. But as the Solicitor General correctly noted, to accept that concept would threaten to reduce Section 2 "to provid[ing] minority groups the ability to participate equally in the electoral process and to have the opportunity to elect representatives only if those candidates are white." A.C. 14 (quoting, *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 691 F. Supp. 991, 1001 (E.D. La. 1988)). Here both courts below accepted the election of Anglos in Anglo versus Anglo races as sufficient evidence to overcome a clear pattern of lack of electoral success in elections in which a minority candidate was in the field. Those holdings are in direct conflict with: *Baytown*, 840 F.2d at

1244-45; *Gretna*, 834 F.2d at 502-04; and *Smith*, 687 F. Supp. at 1316-17. The Solicitor General's attempt to distinguish this clear authority is feeble at best.

The Solicitor General argues that *Baytown* is distinguished because the Fifth Circuit found "no evidence that any Anglo-Anglo race . . . offered the voters the choice of a 'viable minority candidate.' " A.C. 15. Yet the Solicitor General cannot point to any non anecdotal evidence in the record that the three Anglo candidates he identified as the choice of the minority community were sponsored or supported by minority voters, much less offered the voters the choice of *a viable minority candidate*.[3]

The Solicitor General next argues that *Gretna* is distinguishable because there the elections involved multiple seats with black and Anglo candidates running so that the court could compare the relative level of support from the black community for those candidates. A.C. 15. Yet, here too the evidence shows that when given the choice between an Hispanic and Mr. Allen, one of the three Anglos argued to be a candidate of choice of the minority community, the Hispanic community overwhelmingly chose the Hispanic candidates. T.R. 692-693.

Finally, the Solicitor General argues that *Smith* is distinguishable because the polarization evidence was strong, while here two Hispanic candidates came within 22 and 53 votes of victory. The government has misread *Smith* or has chosen to focus on unrelated points. The

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[3] In fact unrebutted objective statistical evidence in the record on the level of support garnered by one such candidate, Mr. Edwards, shows clearly that he was opposed, not supported by Hispanic voters. PX 54 (72% of Hispanic voters supported Mr. McClure over Mr. Edwards in 1980 and 78% of Hispanic voters supported Mr. Bogle over Mr. Edwards in 1984) (See also: Cert. Pet. at 17 n. 11).

court in *Smith* found strong polarization evidenced by the average support for black candidates from black voters at 89%, but Anglo support at 9%. *Smith*, 687 F. Supp. at 1315. Here the average level of support from Hispanic voters for Hispanic candidates was 87%, and from Anglo voters, 21%. A.C. 3. These levels are comparable in establishing strong polarization. The points of distinction offered by the Solicitor General simply have no foundation. (See also Cert. Pet. at 16 for comparison of polarization levels in *Saguache* and those found in *Thornburg*).

CONCLUSION

The Solicitor General argues that this case does not present issues of sufficient importance to merit the Court's review. A.C. 16. Saguache County has a small population. Yet, the undiminishable truth is that no Mexican American has ever served on the Saguache County commission and no Mexican American has ever won a contested, county-wide election contest in Saguache County.

The Tenth Circuit's affirmance based on factors never before used to decide ultimate questions of political access; (a) a lone lay witness contradicting objective, unrebutted statistical evidence; and, (b) the election of three Anglo candidates as proof of minority political access, will have far reaching effects. The decisions below therefore merit review by the United States Supreme Court.

Respectfully submitted,

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